MEETING OF THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

Raleigh, North Carolina May 10, 2012 Minutes

The North Carolina Environmental Management Commission met in the Ground Floor Hearing Room of the Archdale Building, 512 North Salisbury Street, Raleigh, North Carolina. Chairman, Stephen T. Smith presided. The following persons attended for all or part of the meeting.

COMMISSION MEMBERS:

Christopher J. Ayers	Tom Ellis	Kevin Martin	Mayor Darryl D. Moss
Donnie Brewer	William L. Hall	Dr. David H. Moreau	J. Dickson Phillips III
Marvin S. Cavanaugh	Steve P. Keen	Dr. David Peden	Clyde "Butch" Smith, Jr.
Marion E. Deerhake	Dr. Ernest W. Larkin	Dr. Charles H. Peterson	Stephen Smith
			Steve W. Tedder

DIVISION OF WATER QUALITY:

Bradley Bennett	Alan Clark	Elizabeth Kountis	Jay Sauber
Janice Bownes	Nora Deamer	Matt Matthews	Lois Thomas
Ted Bush	Bethany Georgoulias	Sandra Moore	Julie Ventaloro
Kevin Bowden	Deborah Gore	Diane Reid	Chuck Wakild
Connie Brower	John Huisman	Jon Risgaard	

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DIVISION OF AIR QUALITY:Mike Abraczinskas Sushma Masemore Joelle Burleson Angela Terry

Michael Petratjic

DIVISION OF WASTE MANAGEMENT: Ruth Strauss Debra Watts

Betty Gatano Linda Smith

DIVISION OF WATER RESOURCES: Tom Reeder

Sarah Young

ATTORNEY GENERAL'S OFFICE: Frank Crawley

I. Preliminary Matters

Chairman Smith: Chairman Smith called the May 10, 2012 meeting to order at 9:05 a.m.

New member Amy Pickle was duly swore in.

Announcement of Jay Sauber having received the Allen Long Award from the National Water Quality Monitoring Council for an individual who has demonstrated exceptional perseverance, positive spirit and contributions to water resource protection.

Announcement that Dr. Larkin has agreed to accept appointment as Chair of the NPDES Committee.

Reading of Ethics General Statute § 138A-15, which mandates that the Chairman inquire as to whether any member knows of any known conflict of interest or potential appearance of conflict with respect to matters before the Commission. Commission members were asked if they knew of any conflict of interest or appearance of a conflict to please so state at this time.

Minutes: Upon motion by Dr. Peterson and second by Dr. Larkin, the minutes of the May 10, 2012 meeting were approved.

Addition to the agenda: A Commission Resolution thanking and commending Dr. Dave Moreau for his 19 years of service on the Environmental Management Commission, 16 of which were as Chairman.

Dr. Peterson: Let me say that the resolution includes a short list of the major issues that he helped guide through the Commission of great importance but I will read some of the beginning and the end which I think expresses our gratitude for the person as well as his contributions.

Proclamation Honoring Dr. David H. Moreau for Exceptional Service to the Environmental Management Commission and the People of North Carolina

Whereas, Dr. David H. Moreau prepared himself by earning a B.Sc. in Civil Engineering at Mississippi State University, a M.Sc. in Civil Engineering at N.C. State University, a M.Sc. in Engineering from Harvard University and a Ph.D. in Water Resources from Harvard University;

Whereas, Dr. David H. Moreau served as EMC Chairman from 1992-2008 and as an EMC member until 2012.

Whereas, the people of North Carolina live in a healthier, cleaner, more beautiful and more prosperous state due to Dr. Moreau's decades of public service;

Whereas, Dr. Moreau has served as a friend, mentor and role model to many present and past EMC members and to staff members of the North Carolina Department of Environment and Natural Resources;

Therefore, the members of the Environmental Management Commission express our strong gratitude for his distinguished service to the Commission, our deep appreciation for his devotion to improving the quality of life in North Carolina, our great admiration for his leadership skills, and our thanks for his friendship.

Upon motion and second the resolution passed.

12-10 Request to Confirm DENR Secretary's Appointment of Four Members to the Water Pollution Control System Operators Certification Commission (WPCSOCC)

Dr. Peterson: Motion to approve these appointments with great gratitude to all four gentlemen. Mr. Hall seconded. The motion passed. Thank you for being here Mr. Rimmer.

12-11 Hearing Officer's Report on Permanent Rule Amendment to Defer Carbon Dioxide Emissions from Biomass from Prevention of Significant Deterioration Requirements 496

Mr. Ayers: I will not read through the entire agenda item but first Mr. Brewer and I were appointed as hearing officers and acted as officers in this hearing. Just to refresh your memory, on July 20, 2011 promulgated a three year deferral period for consideration of carbon dioxide (CO₂) emissions from bioenergy and other biogenic sources when determining whether a stationary source meets prevention of significant deterioration and Title V applicability thresholds. The deferral only applies to biogenic CO₂ emissions and the PSD and the Title V programs, and EPA indicated that EPA intends for the deferral to be temporary while the agency completes its science and technical review of the issue of accounting for the net atmospheric impact of biogenic CO₂ emissions.

The reason for this rulemaking is the NC rules did not automatically implement this new federal deferral. Thus the state rule amendment we're considering today reflects the federal deferral while the uncertainty surrounding the impact of biogenic CO₂ emissions and how such emissions will be handled in the overall GHG framework is being resolved at the federal level.

You may recall that we adopted a temporary rule amendment to implement the new federal deferral and that became effective on December 23, 2011.

A public hearing was held in Raleigh, North Carolina, on March 14, 2012, to take public comments on amendments on the rule. No one appeared at the hearing to provide oral comments. We did receive two sets of written comments on the proposed rule. During the comment period I believe these were the same commenters that submitted comments in the temporary rulemaking. One commenter opposed the adoption of the amendment of citing biogenic CO₂ as an emissions threat and as potentially having a disproportionate impact to people of color and the poor. One commenter reviewed the rule amendment and did not suggest any changes to the amendment. As a result no changes were made to the proposed rule as a result of these comments.

The Environmental Management Commission also requested comment on the economic assessment and no comments were received on the economic assessment during the hearing process, and thus no changes were made to that economic assessment. The Hearing Officers recommend that the Commission adopt the proposed rules as presented in Chapter II of the hearing record.

Upon motion and second to approve the amendments, the motion passed.

Mr. Phillips: Let me just interject here that we heard yesterday in our Renewable Energy Committee meeting a report that had been commissioned by the Southern Environmental Law Center that addressed the topic of greenhouse gas emissions from bioenergy, production of power from primarily woody biomass sources. Noting that the amount of carbon generated from the same amount of power generation is greater for woody biomass that for other fossil fuels due to the lower density of the fuel source and suggested that this study shows that there will be a so called carbon debt meaning that more carbon will be released and be sequestered over an extended period of time from burning woody biomass to generate power. So this is the topic that we will need to address as we move forward.

Chairman Smith: Thank you Mr. Phillips.

12-12 Request to Proceed to Hearing on Clarification of 02Q .0102 Permitting Exemption (509)

Patrick Knowlson: I'm here to ask the Commission to approve one or more public hearings for our amendment to 15A NCAC 02Q .0102 exemptions. This is our general permitting exemption rule. Also here to ask the Commission to approve the fiscal note that accompanies the amendment. Why we are here is that the Division of Air Quality recognizes there was a need for clarification between our toxic exemptions that are in 02Q .0702 and our permitting rules before you. The permitting rule has a list of exemptions for our general permits in 02Q .0102 our permit exemptions for air toxic permits, when there's interaction between the two rules, one part of our thing, where they would potentially lose their exemption for these exemptions in .0702 which would require them then to need a permit. What these exemptions are is that they are very small sources that EMC in the past has exempted from our toxic permit rules. They're small things like cleaning supplies and domestic water heaters and things like that. We're going to amend our paragraph (b)(7), one sentence that's on the first page of our rule, line 2930, to clarify that we do not want to permit these small little sources because it would be just a burden on industry and there would not be really any gain environmentally to permit these small sources.

Ms. Deerhake: I will just say that this draft was considered in the Air Quality Committee meeting and on behalf of the Air Quality Committee I move that we proceed to public hearing. Second by Mr. Cavanaugh and the motion passed.

12-13 Request for Approval of the Final Roanoke River Basinwide Water Quality Plan

Melanie Williams: made a detailed presentation and requested final approval of the Roanoke River Basinwide Water Quality Plan. This presentation was given to the Water Quality Committee in November. The presentation covered a broad overview of the basin location of past and current impaired waters, an update of water quality general issues, actions and needs found within the basin as well as status of the plan.

Dr. Peterson: The Water Quality Committee did indeed hear this and discussed it back in November or thereabouts, and we had some questions about copper which have been addressed since then. Tom Ellis and I, your representatives on the Coastal Habitat Protection Plan Steering Committee, learned in March a subsequent fact that will apply to the Roanoke and may require some sort of broader working group to assess. That is a second of our sturgeons was added to the endangered species list. These are species that go well upstream. They look prehistoric so they attract me in that regard. But I suspect that will result in some added work over the next 5 years and I would suggest that perhaps an appropriate set of words somewhere in this document might be added to note that. Louis Daniel, Director of Marine Fisheries, is very knowledgeable about it, and has been at the forefront of it if you need any more details. So that if my date of March is not the right one but could be corrected. But since that is happening we have an opportunity to add a sentence in some place that identifies an emerging issue that we can show that we in water quality are aware of. I would appreciate it. With that addition I would move that we approve this plan.

Motion by Dr. Peterson and second by Mr. Brewer to approve the basinwide plan. The motion passed.

12-14 Request Approval of the Proposed Reclassification of the Neuse River and Associated Quarry in Johnston County (Neuse River Basin) to Class WS-IV

Elizabeth Kountis: I will be giving the first part of this presentation. Belinda will be providing the later part of it.

In July and September of 2011, the Water Quality Committee and the Commission, respectively, approved the Johnston County request to proceed with rule-making for two portions of the Neuse River and an abandoned quarry in Johnston County. The quarry which is located in the upper right hand corner of this slide, is to receive water from a proposed Neuse River intake, which is shown at the bottom of this red on the bottom of the slide. U.S. 70 traverses across the top of the map and the Town of Princeton is shown along the southern side of U.S. 70. The quarry, as shown in the upper right hand corner of the map slide, lies along the southern side of Little River, and north of the Town of Princeton US 70. It's proposed to be reclassified to Water Supply-IV critical area, and the quarry's proposed critical area is shown as that small purple area. The boundary of this critical area consists of the top of the quarry. The remaining portions of the river to be affected by this reclassification are shown south of US 70 and the Town of Princeton. One portion of the Neuse River is to be reclassified to WS-IV critical area, and a second portion is to be reclassified to WS-IV protected area. As a reminder, the intake is shown at the base of this reddish area and that reddish area is the proposed critical area for this intake. The proposed protected area for the intake is this yellow polygon at the bottom left hand corner of the map. Then there's a portion of the watershed draining to the intake, which exists between the intakes's proposed river critical area and the proposed protected area, which is already classified as protected area for the City of Goldsboro's existing downstream Water Supply-IV intake on the Neuse River.

This reclassification is needed in order to construct the proposed Neuse River intake and utilize the water in the quarry as a public water supply. This new water supply source is intended to meet Johnston County's water supply demands anticipated through 2050. The Division of Water Resources concurs with the proposal, and an Environmental Assessment for the project received a finding of no significant impact. According to 2011 DWQ studies, the subject waters

do meet water supply standards, except for high chloride levels in the quarry. These levels have likely been caused by high rates of evaporation and long residence times of water in the quarry. Dilution and shorter residence times of water in the quarry that will occur after river water is pumped into the quarry should result in reduced chloride levels.

If the proposed areas are reclassified Johnston County would be the only local government that would have to alter its water supply watershed protection ordinance to reflect the reclassification's requirements, because it is the only local government with jurisdiction in all of the proposed areas. Furthermore, because Johnston County submitted this reclassification request, it does not need to submit a resolution to DWQ.

As a reminder, such a resolution indicates if a potentially impacted local government will administer water supply rules within its jurisdiction once a water supply reclassification becomes effective. In addition, if the subject areas are classified, wastewater discharge and new development requirements will need to be implemented in all of the proposed areas. Furthermore, in the critical areas only, additional treatment will be required for new industrial process wastewater discharges and no new landfills or land application sites will be allowed. There are no proposed land application sites or landfills in the proposed critical areas, and no existing or proposed wastewater discharges in any of the proposed areas. Furthermore, there are not any known planned developments in these areas. The areas are generally undeveloped with limited crop lands. At this point, Belinda Henson will provide the remainder of this presentation.

Belinda Henson: On December 13, 2011, Division staff and I conducted a public hearing in Princeton, North Carolina. The purpose of the hearing was to receive public comments on the above-mentioned proposed reclassification and associated fiscal note. Of the 10 people who attended the hearing, two people spoke. One of the speakers appeared to support the reclassification, and the other speaker had concerns but did not oppose the reclassification. During the comment period, two letters providing information were received from Johnston County and the Division of Water Resources, and two letters stating concerns about the reclassification were received, one of which came from a person who spoke at the hearing. These comments contained several issues of concern, primarily about flow and quantity, which can be addressed by referencing information already presented by staff and/or publicly available. More specifically, these concerns can be grouped with corresponding DWQ responses, as follows:

Concern was expressed that too much water will be withdrawn and is not needed from the Neuse River via the proposed intake. Division of Water Resources oversees water quantity issues, including water withdrawal amounts and the need for such amounts, and information on these issues for the proposed project was reviewed by the Division of Water Resources during the Environmental Assessment process. According to Johnston County, the greatest daily demand in 2050 for Johnston County is estimated to be 38.2 mgd, and thus, a 42.0 mgd new intake is reasonable to meet long term needs.

Concern was also expressed regarding what will happen once Johnston County's permitted NPDES discharge flows are reached. Once Johnston County's discharges start to approach permitted flows, then Johnston County would need to seek flow expansion/s from DWQ.

The remaining concerns involved the effect of the proposal on flow available for downstream users, especially during times of droughts. More specifically, the lack of a high flow skimming component to the proposal to meet potable water supply demands was mentioned, and according

to the Division of Water Resources, which approves operation of water supply intakes, as well as Johnston County staff, the proposal does have a high flow skimming component.

Concern was expressed about the lack of low flow modeling in the Environmental Assessment for the proposed intake alone as well as in combination with Johnston County's current intake. A related concern was the lack of representation of all users in the current overallocation of Neuse River withdrawals, and the potential detrimental impact on humans and animals of such over- allocation. Flow modeling is performed by Division of Water Resources staff to assess downstream impacts of withdrawals, and typically this modeling is performed in association with an Environmental Assessment when an intake's proposed capacity exceeds 20% of the 7Q10. The Division of Water Resources initially deemed that such modeling was not required for this proposed intake, but due to these expressed concerns, decided to run Neuse River low flow model runs. In April 2012, Division of Water Resources completed hydrologic model runs for the period of record flows for the Neuse River that included withdrawals of all existing water supply users and Johnston County's proposal. The model run results were analyzed for the period when the minimum flow occurred at the locations of points of interest within the modeling scope for the river basin. The results from the model runs for the low flow period showed that water withdrawn from the Neuse River via Johnston County's proposal will not affect the reliability of water supply for downstream users. Thus, the results of the model runs also showed that existing Neuse River water supply users downstream of the proposed intake currently have a reliable source of water supply. This information about the Division of Water Resource's modeling efforts was presented in the amendment to the Report of Proceedings that was posted on-line on May 1, 2012. Finally, Johnston County staff feels that both Johnston County intakes are accounted for in the 7Q10 value at the proposed intake site.

A final concern expressed was that increased withdrawals due to this project during times of low flow would lead to higher concentrations of pollutants, and in turn, detrimental impacts to the adequacy of treatment in downstream water treatment plants and water quality for aquatic life. According to Division of Water Resources staff, existing water treatment plants should already have plans in place to ensure adequate treatment of water during a full range of flow conditions. In addition, DWQ's Class C standards currently in place for the subject waters are designed to protect several uses of these waters, including aquatic life. Furthermore, the proposed reclassification is designed to assure that water supply water quality standards continue to be met, and afford additional protection directly to the subject areas and indirectly to downstream waters.

The Report of Proceedings, which was sent to the members of the EMC prior to today's meeting, includes all written comments received, further details on the comments and the Division's responses regarding the proposed reclassification.

Based on consideration of the comments and available data, staff and I recommend that the proposed reclassification of the Neuse River and the associated quarry, as described in the agenda item and the report on these proceedings, be approved. If reclassified, the proposed effective date is estimated to be July 1, 2012.

Motion by Mr. Tedder and second by Mr. B. Smith to approve the reclassification. The motion passed.

12-15 Request to Proceed to Public Hearing with the Proposed Reclassification of Segments of Maiden and Allen Creeks in Catawba and Lincoln Counties (Catawba River Basin) to Class WS-V

Elizabeth Kountis: I am here to ask the Commission to approve a fiscal analysis and to grant staff permission to send that fiscal analysis and the associated proposed reclassification out to public notice and hearing. The request received from the Town of Maiden is for two portions of Maiden Creek and two portions of Allen Creek in the Catawba River Basin, which are to be reclassified from Class Water Supply-II High Quality Waters to Class Water Supply –V.

On the screen is a map of the area proposed to be affected by this reclassification. The Catawba-Lincoln County line is the black line running nearly parallel to the bottom of map. The Town of Maiden is shown as the solid gray polygons that surround US 321, which runs along the left side of the map. NC 16 runs from the middle of the right side of the map up to the middle of the top of the map. It crosses a portion of Maiden Creek's upper watershed.

Allen Creek flows into Maiden Creek, which then empties into Pinch Gut Creek, which then flows to Clark Creek, which then eventually flows to the South Fork Catawba River. The critical areas for these water supplies are shown in a cross-hatched pattern area. Maiden Creek's intake is located within a reservoir whereas Allen Creek's critical area is drawn based on an intake in the creek. The Balance of the Watershed for these water supplies are shown in the dotted areas in the center of the map These areas contain very limited development, and are primarily a mixture of undeveloped forested and pasture lands.

Finally, the green shading on the map represents areas where Phase II Stormwater rules currently apply; this green shading covers all of these Water Supply-II watersheds except for 87 acres in the very eastern side of Allen Creek's watershed located within Lincoln County There are several reasons why a Water Supply-V, and not a Class C, designation was chosen for this proposed reclassification:

- First of all the Water Supply-V classification is the only North Carolina classification that recognizes formerly used water supplies; Title 15A NCAC 02B .0218 (1) states that and I quote, "The best usage of WS-V waters are as follows: waters that are protected as water supplies which are generally upstream and draining to Class WS-IV waters or waters previously used for drinking water supply purposes or waters used by industry to supply their employees, but not municipalities or counties, with a raw drinking water supply source..." The Town understands that it cannot use these waters as public water supplies should these waters be reclassified to Water Supply-V.
- Secondly, it may be regularly easier on various parties if a public water supply classification is desired again in the future; for instance, if dischargers come into this watershed, it would probably be more cost effective for them as they'd already be meeting water supply water quality standards.
- Finally, according to the Clean Water Act, removal of an existing use, such as a water supply use, would require showing the use cannot be attained, showing the use could be attained by implementing regulatory measures, or adding a use requiring more stringent criteria; in this case, we know the use is currently attainable, and the requestor does not want more stringent criteria to these waters. In addition, according to this act, existing

uses are attained uses in a water body on or after November 28, 1975, which is a condition met in this case.

The reasons that the Town provided for the reclassification are three-fold:

- 1. The Town no longer uses, and will not use, these water supplies because they are inadequate to meet water demands and the associated water treatment plant has been dismantled:
- 2. An existing long term contract with the City of Hickory allows the Town to currently and into the future receive treated water from the City of Hickory; and
- **3.** There are other protective measures, primarily the Phase II regulations, which already apply in these watersheds.

Because these waters are no longer used as public water supplies, this proposal would result in an updated, accurate representation of the current use of these waters, and therefore, serve the public interest per Executive Order #70, Session Law 2011-398, and General Statute 150B-19.1. The Division of Water Resources staff stated that the Maiden Creek intake and associated water treatment plant have been rendered inoperable and decommissioned, respectively, and thus, the plant is incapable of pumping and treating water. These staff also stated that the Town never built an intake structure in Allen Creek, but did use water from the creek for public water supply purposes a few times in the past during droughts. Furthermore, Division of Water Resources staff stated that the Town should be granted the reclassification because the Town is currently purchasing treated water and plans to do so in the future. An "Agreement for Plant Capacity and Bulk Water Sale" was signed in 2002 by the Town and the City of Hickory and allows for the sale of treated water from the City of Hickory to the Town for 25 years.

It appears, based on the historical record of DWQ data and sampling of these waters, that the High Quality Waters designation associated with these waters was assigned solely due to the Water Supply-II designation; for your information, all Water Supply-II waters are High Quality Waters by definition according to 15A NCAC 02B .0101 (e)(5). DWQ has no water quality data for Allen Creek, and DWQ's data for Maiden Creek, which was generated after this creek became WS-II, actually shows less than excellent, that is less than high, water quality as well as impairment; sediment, flow, and impacted aquatic life are issues in Maiden Creek.

The local governments with jurisdiction in the existing water supply watersheds, the Town of Maiden, Catawba County, and Lincoln County, have submitted written support for the reclassification, even though such written support is not required for this reclassification. Additional written stances of support or neutrality from parties involved in restoration efforts for Clark Creek have also been received. As mentioned earlier, Allen Creek flows into Maiden Creek, which in turn flows to Pinch Gut Creek, which then flow into Clark Creek, and parts of Clark Creek are impaired for fecal coliform, biological integrity, copper and/or turbidity. The Catawba Riverkeeper provided a verbal stance against the reclassification, stating that it would result in an increase in development within the watersheds, and if waters are not meeting standards, then they shouldn't be downgraded. Please know that the change in classification from WS-II HQW to WS-V for these creeks should not impact the ability to restore Clark Creek or Maiden Creek, based on current understanding of development in the watershed; the watersheds in these creeks are currently dominated and projected to be dominated, by a mixture of

undeveloped forested and pasture lands, which are not impacted by the Water Supply, HQW, nor Phase II rules.

If reclassified, several restrictions regarding new development will no longer apply in these water supply watersheds. However, please note that the involved local governments are not required to modify their ordinances should the reclassification become effective, and thus, development restrictions currently in place may remain in place. As mentioned earlier, Phase II rules already apply in nearly all of the proposed areas, and compliance with Water Supply-II stormwater rules equates to compliance with the Phase II rules. Nevertheless, if the proposal becomes effective and the local governments do decide to no longer enforce the Water Supply-II and High Quality Waters regulations, compliance with Phase II rules would still be required. The Phase II rules would apply substantial, albeit not as stringent, restrictions on new development compared to the restrictions associated with the existing classifications of these waters. This shift in implementation to Phase II stormwater rules will result in the following regulatory differences for new development:

- a disturbance threshold trigger acreage of one acre to be met in order for density and setback requirements would apply, whereas now the WS-II rules have no such threshold trigger;
- a higher built upon area maximum for low density projects, which is 24%, will apply, versus WS-II rule requirements of 12% in the balance of the watershed and 6% in the critical area; respectively.
- no high density project built upon area maximum will apply, whereas the WS-II rules have a 24% and 30% such maximum in the Critical Area and Balance of the Watersheds, respectively
- a higher maximum dwelling unit per acre ratio for low density projects, which is 2/1, would apply versus the WS-II regulations, which call for a 1/1 ratio in the Balance of the Watershed and a ½ ratio in the Critical Area; and
- a smaller setback for high density development will apply, which is 30 feet for perennial and intermittent waters, versus the WS-II required 100 feet for perennial waters.

If reclassified, several additional restrictions regarding waste activities, specifically wastewater discharges, new landfills, and new land application sites, will no longer apply in these water supply watersheds. Do keep in mind that the water supply water quality standards will remain in effect for the subject waters. This shift in implementation rules to WS-V restrictions will result in regulatory differences regarding waste activities shown on this slide. Those would include:

- any type of wastewater discharges would be allowed, whereas in the WS-II watersheds only general permits are allowed;
- no specific restrictions regarding allowable landfills will apply, whereas the WS-II regulations do call for no new landfills in the critical areas and no new discharging landfills in the balance of the watershed; and
- no specific restrictions regarding land application sites would apply, whereas no new land application sites are allowed in the WS-II critical area.

There are currently no permitted or known planned wastewater discharges in the proposed areas. In the existing Water Supply-II critical areas, there are currently no permitted or known planned landfills or application sites. Furthermore there's no known planned development in the subject areas according to local government staff. As a reminder, the subject areas contain very limited development; they are primarily a mixture of undeveloped forested and pasture lands, which again the Water Supply, High Quality Water and Phase II rules do not affect. So such land uses would not be impacted by this proposal. Due to this information, and that there is no requirement that the local governments' ordinances be amended should the proposal become effective, the quantifiable results of the proposal's fiscal analysis show no cost to the local municipalities and counties, and a one-time cost of \$350 to the state; thus, the proposal meets the requirements of SL 2011-13, as its fiscal analysis shows a cost less than \$500,000.

DWQ requests that the EMC approve the fiscal analysis and grant staff permission to go to public hearing with the proposal and the fiscal analysis. The proposed reclassification's effective date is estimated to be March 1, 2013. I would be happy to take any questions you may have.

Dr. Larkin: Thank you. That was a wonderful presentation of a pretty complex issue that we did discuss at the Water Quality Committee Meeting in March. We had covered a lot of these points in our discussion and then voted to approve sending this proposal here to the EMC which we've done. So I would move on behalf of the Water Quality Committee that we send this proposed reclassification and fiscal note to public hearing.

Chairman Smith: Motion by Dr. Larkin. Second by several people, Mr. Brewer, Mr. Morse, Dr. Peterson. Discussion?

Dr. Peterson: Clarification? Does that motion include accepting the fiscal note as well?

Dr. Larkin: Yes.

The motion to approve the reclassification passed.

12-16 Request for Approval of Local Programs Implementing the Jordan Lake New Development Stormwater Rule, and Delegation of Further Approval Authority to the Director

Jason Robinson: Gave a brief summary of the new development rule requirements of the Jordan rule; pointed out some differences between the Jordan and the Falls requirements; covered the program submittal requirements; gave an overview of the submittals that we received; and provided staff's recommendation for approval and delegation.

Chairman Smith: Thank you Mr. Robinson. Any questions or comments?

Mr. Phillips: Jason, not having been able to devote all my last two weeks to reading these ordinances I confess that I've not done that. Were there any themes of issues that emerged in these ordinances where the provisions of the rules are resisted in any respect that we should focus on?

Jason Robinson: Not that I recall. One of the biggest problems was the local governments that were incorporating the existing language into their existing ordinances, some of those ordinances being hundreds of pages long, trying to figure out where and, of course, we requested that they show where there may be changes but we had some trouble sometimes getting them to point that out. Other than that, it was one of the biggest issues. For the most part after we came back with the initial reviews we found that they were very willing to make those revisions.

Mr. Phillips: The second question I have was I don't figure there are any requirements for this in the rules, but has there been a training program for the local government people who are going to be administering or issuing these approvals?

Jason Robinson: Well there was, in developing the model program we had several back and forth meetings for local governments to develop model programs and getting the feedback and what kind of guidance they thought they needed. Also for the accounting tool that was developed by NC State there were two workshops held for the Jordan local governments. Since the same tool is being used for the Falls, the Falls also had a workshop, and just recently another workshop is being scheduled for September which will, of course, be after its being implemented. So we imagine there will be more interest.

Mr. Phillips: Are those mandatory?

Jason Robinson: No, not mandatory. Again we expect more interest. After the implementation begins people really want to come in.

Dr. Peterson: On behalf of the Water Quality Committee who heard this yesterday I make the motion that we approve the 32 of the 33 local programs and we also approve the delegation of the further approval of authority to the Director.

Chairman Smith: Would you add a third prong to that, that is, dealing with Pittsboro directing the change?

Dr. Peterson: Yes

Chairman Smith: Motion by Dr. Peterson and second by Mr. Hall. Any discussion?

Mr. Smith: Do we have any costs of what this is actually going to cost in the stormwater and all, everything for the towns and the public?

Jason Robinson: We did have a fiscal analysis during the rulemaking process. I apologize that I don't recall the number but it is available on the Jordan website. There's a fiscal analysis that went out to public review.

Mr. Smith: Do you recall what it was?

Jason Robinson: For the new development rule, no I'm sorry I don't remember right off the top of my head. If you go to the Jordan Lake.org stormwater on the left you'll see a rulemaking archive and in there is the fiscal note.

Chairman Smith: Other questions or comments? We have a three prong motion and a second. The motion carried. Thank you Mr. Robinson.

12-17 Presentation of Administrative Law Judge's Recommended Decision, Freedman Farms, Barry Freedman v. DENR, DV 05-006, 05 EHR 0905

This is an appeal from administrative law judge order. Let me also thank Ms. Hauser for being here in Mr. Crawley's absence.

Chuck Wakild: Our attorney's aren't here yet. We are prepared to go on if you want to with the information items.

Chairman Smith: We can proceed and if we run into anything that we need to hear from your attorneys then we will stand aside.

Jennie Hauser: If you would like Mr. Chairman I'll get us started just procedurally by reminding the Commission members that we are going to switch gears now. You've been acting in your quasi legislative capacity this morning to this point and approving plans and sending rules out to public hearing. This proceeding is in your quasi-judicial capacity and so you're required to think into your personal interest and see whether or not you may have a conflict of interest with this particular matter coming before the Commission. Also to think about whether or not you can be an impartial decision maker because that is what our legal system requires for these types of matters, and that means you have to limit your decision making to the record that has been created and presented before you. Now your record, because of this particular proceeding has quite a lengthy procedural history which I'll remind of in a second, your record includes not only the record that was created at the Office of Administrative Hearings but the attorney for DWQ has filed and you have in your paperwork that was presented to you before the meeting today, a written argument on behalf of DWQ's position.

Just to bring you up to speed on the proceedings in this particular matter previously the Administrative Law Judge upheld both the adjustment of the civil penalty which was a \$6,000.00 civil penalty for violation of various DWQ regulations and an investigative cost amount of \$989.50. On March 12 of 2009 this body, the EMC adopted the ALJ's decision in full. You took no exceptions to that decision. The petitioner subsequently filed for judicial review in Bladen Superior Court and on January 11, 2011 the Superior Court judge agreed with the assessment of the civil penalty but determined that neither the ALJ nor the EMC had made specific findings with regard to the investigative costs, and remanded the case to you. There was a subsequent appeal of that decision. The appeal was not perfected; therefore the appeal was dismissed.

So today you have before the remand from the Bladen Superior Court to make a determination regarding investigative costs. That's the sole issue before you. The penalty for the violation stands at this point. But the issue is, is there information in the record and at this point you would be looking to the OAH record which includes the transcripts of the hearing and

you would consider the written arguments of counsel, but those are not evidence in this case; just for your consideration to point you to places in the record, and determine whether or not you can make findings to support the award of investigative costs or whether there's insufficient evidence to do that and you need to abandon the investigative costs.

Chairman Smith: Thank you Ma'am.

Ms. Deerhake: Mr. Chairman I'm sorry. I missed the original call at the beginning of the meeting where recusal is said. But I just wanted to point out for the record counsel who reminded me that in 2009 I had recused myself and previously we heard the case on its merits. I took the precaution of recusing myself not knowing if the former operator was participating in an EPA cooperative agreement that I managed that provides free confidential nutrient management planning services to the eastern 27 states. I still do not know if this gentleman participated in the project since the merits aren't before us today. I do not believe that I have a conflict.

Chairman Smith: Are you all comfortable going forward with discussion or action based on your reading of the record or do we need to wait and hear from Ms. Oliver? I don't believe anyone's here on behalf of Freedman Farms or Barry Freedman, but let me ask that formally. Is anyone here on behalf of Freedman or Barry Freedman? No one responded.

Dr. Peterson: In answer to your question Mr. Chairman I'm prepared to make a motion on this. My motion would be to uphold the full cost investigative costs of \$989.50 as originally assessed on the basis that there is evidence in the record that these costs are assessed by the usual way in which we do those cost assessments.

Jennie Hauser: I'll have to get you to clarify where in the record that is.

Considerable discussion ensued, after which:

Chairman Smith: Ms. Hauser is going to restate this motion as it has been cobbled together by the group.

Jennie Hauser: What I have heard and this is based on what Dr. Peterson first said was to uphold the full investigative cost based on, and then we have the testimony of the witnesses that are set out in Ms. Oliver's document, specifically pointing to Exhibit number 15 which Mr. Tedder brought forward which states the costs; then including Mr. Phillip's statement that this evidence in the record supports a conclusion that the costs were reasonable.

Chairman Smith: Is that a fair statement, Dr. Peterson? Who seconded?

Mr. Tedder: I did.

Chairman Smith: A second by Mr. Tedder. Further discussion? Hearing none the motion passed.

II. Information Items

12-09 Update on Statewide Mercury TMDL

Kathy Stecker: I am here to update you on the mercury total maximum daily load or TMDL. As you know we have three related documents now available for public review and comment. I'll talk a little about each one.

First here's an updated schedule. The three documents were made available on April 27th beginning a 45 day comment period. While we have not received many direct inquiries there have been over 260 downloads of the documents as of yesterday. We'll hold two public meetings not hearings this month. The intent of the meetings will be mainly to answer questions about the three documents. People can submit written comments on the TMDL until June 11. Then depending upon the comments we received we may revise the TMDL and we plan to come back to you for approval in July. Here are the dates and locations of the meetings. The first will be held next Monday in Hickory at the Council of Governments Building. The second will be the following in New Bern at the Craven County Extension Building. At the bottom of this slide is the link to the mercury TMDL webpage where you can find the documents, schedules and other information. If that link is too long you can just Google North Carolina Mercury TMDL and I think that gets you there.

The first document I'll talk about is the draft mercury TMDL. Here's a list of components of any TMDL. You'll find this and more in the draft for the mercury TMDL. For any TMDL there's an investigation of the sources of the pollutant. There's a quantification of what the current loadings are and how much they need to be reduced. Then that reduced load is allocated back to the sources. The NPDES permitted sources get waste load allocations and other sources get load allocations. There must be a margin of safety which can be explicit. For example a portion of the load held aside or it can be implicit in assumptions and approaches used TMDL development. Whenever a TMDL includes reductions from nonpoint sources and point sources there must be reasonable assurance that the nonpoint reductions will occur. Finally there must be a public review and comment opportunity for all TMDLs. Ultimately this equation is what any TMDL boils down to, a quantification of the total load to the water that will result in attainment of standards. That load is allocated to point sources in the case of mercury wastewater treatment facilities and nonpoint sources with mercury atmospheric deposition. If we were specifying reductions for stormwater in this TMDL the NPDES permitted stormwater reduction would be reflected in the waste load allocations, and non NPDES stormwater would be included in the load allocations. But as we've mentioned before no reductions from stormwater are proposed in this mercury TMDL.

To get to where we could estimate those allocations for mercury, we first had to evaluate fish tissue concentrations. We determined that the base line largemouth bass (that's what LMB is) concentrations statewide is 0.9 mg. per kg. Then based on EPA, FDA and in part on North Carolina Department of Health and Human Services and other sources, a target fish tissue mercury concentration of 0.3 mg. per kg. was selected. Please note that this is a fish tissue; not water column target. As you know mercury bio-cumulates in fish, people and other organisms. We see high levels of mercury in fish even though water column levels of mercury are low.

So we estimate that a 67% reduction in mercury from all sources including those outside the state is needed to meet the target. The baseline point source load was calculated using data submitted by wastewater dischargers and the baseline nonpoint source load was estimated by the Division of Air Quality using the CMAQ model. That's Community Multiple Scale Air Quality

model. So again here's the equation for the TMDL. In applying the reduction yields allocations of 81 lbs per yr. for wastewater and about 3,900 lbs per yr. for atmospheric deposition. In the mercury TMDL the margin of safety is implicit. We are not proposing to hold aside any of the allocation as a margin of safety.

How do we propose to implement the TMDL? Know that the implementation plan is not part of the TMDL itself. The second document available for public review is a draft wastewater permitting strategy and I'll go over that now. We estimate that wastewater contributes about 2% of the total mercury load to North Carolina waters. The draft TMDL specifies the statewide aggregate load to 81 lbs per yr. in the previous slide. We've already achieved significant reductions in mercury and wastewater compared to the 2002 baseline. The proposed wastewater permitting strategy is designed to keep overall loading low and prevent local problems. It would work like this for individual permits.

First there would be an analysis to see if the untreated discharge has a reasonable potential to violate water quality standards. If not only monitoring would be required. For those with the reasonable potential there would then be a comparison of the effluent concentrations with the instream standard taking into account the flow of the receiving water. In general if the concentrations are low compared to the standard, only monitoring would be required. Some facilities will receive or maintain mercury limits based on the instream standard. The maximum limit on any permit would be 47 nanograms per liter which is consistently already achieved by 93% of facilities in North Carolina that monitor for mercury. Many permits would also contain a requirement for a mercury minimization plan. Again we've already achieved significant reductions since the 2002 baseline.

The third document available for public review is a menu of options that describes other actions the state could take as part of a broader strategy to reduce mercury pollution from nonpoint sources; in particular how to address air emissions and mercury. Atmospheric deposition accounts for 98% of the mercury loading to surface waters in North Carolina. Only about 16% of that deposition is from North Carolina sources. Options described in the document include a petition under Section 319(g) of the Clean Water Act to request that EPA convene a conference of contributing states to account for their mercury reduction efforts. One option for a more comprehensive mercury strategy include encouraging EPA to continue to press for national and international action to address mercury emissions originating outside the state. Trading mitigation and other options are more focused on managing mercury within North Carolina. This table shows expected reductions and mercury emissions in North Carolina under current state and federal laws and regulations. As you can see we believe we will achieve North Carolina's share of the reduction compared to the 2002 baseline. Again here are the meeting dates.

We'll be discussing all three documents at these meetings starting next week. Here are the key dates again, and at that July EMC team meeting, we understand that you would like for us to come back to you for your approval of the TMDL. Also in July as required by rules the EMC adopted in 2007 specifically for reduction in mercury emissions within the state, you'll hear an update on mercury regulation in North Carolina from the Division of Air Quality. I'd just like to add that when EPA approves the TMDL all the waters will be listed taken off the 303d list for mercury and fish tissue. So at that point we won't have any waters on the 303d list for mercury and fish tissue. Thank you and I can answer questions. I also have other people if you get very detailed in your questions that can help me answer.

Mr. Tedder: This is a question. When you go to the public meetings will that include the TMDL as well as all the permitting strategies for comment?

Kathy Stecker: All three documents will be presented and discussed.

Mr. Tedder: Just a follow-up. You said that this does not include stormwater, the strategy?

Kathy Stecker: The current TMDL does not propose any reduction for stormwater.

Mr. Tedder: The reason I ask that, I mean there are certain **GP's** "general permits" such as NCG12 with very specific language that says, "If a TMDL has been developed it will be applied for general permits and those are stormwater permits." I'm wondering how that is balanced out because it's in the document. It's in the actual general permit and I know there' probably four or five general permits getting ready to expire. Would that be included in those permits? I'm just trying to find out where we are when it's being said two different ways.

Kathy Stecker: It sounds like it could be addressed in the permitting strategy to clarify exactly what it applies to and what it doesn't apply to.

Mr. Tedder: Do we know how many facilities? I know you all did a detailed view of facilities and their current loadings or levels that they're achieving. I know with this strategy you're talking 47 is a MAX. Do we have any facilities that actually exceed that right now?

Kathy Stecker: Yea. Jeff you want to come up?

Jeff Poupart: There are currently only two facilities that cannot achieve the standard of assistance.

Mr. Tedder: Can you tell me what those are and what their limits are?

Jeff Poupart: I don't have their limits in front of me but its Progress Energy's Asheville Plant, and the Davidson River Village formerly the Ukusta Mill. Both are in the Asheville region.

Mr. Tedder: My question would be would they automatically get revised permits once this TMDL if it is approved? Would they get revised limits down to the 47 or would they fall under the ability for new facilities? That's my question. I don't know what the numbers are but I'm assuming they could be as high as two or three hundred. Four hundred nanograms are in their permit right now and obviously under this strategy they would have to go down. Their permits would be revised under this down to 47, right?

Jeff Poupart: There are provisions in the permit to give some interim period for permit mercury minimization to occur for 4 years of a five year permit cycle.

Mr. Tedder: So the answer is correct. It would be changed.

Jeff Poupart: It would be changed at some point, unless the significant case could be made to show why it shouldn't be.

Mr. Tedder: One other comment and this is what I was trying to look at the difference between municipals and industrial sources. Under municipals addendum no. 4 it says new sources will be allowed as long as the aggregate point source load for this state is not exceeded. That's for municipals not included under industrials, and I'm curious why or why it's in the first one? I really don't think it ought to be in either. Why is there a difference in industrial than municipal there?

Jeff Poupart: There shouldn't, it must be an oversight. The point of the TMDL is, for example the 81 lbs. is the aggregate baseline load assigned to point sources and if you add up all the limits assigned to all the permittees in the state it cannot exceed that 81 lbs. That's the aggregate baseload. Probably it's the same for industrial and municipals. It should be restated.

Dr. Peterson: I have a couple of questions. I don't understand the air portion of this. If North Carolina's contribution to what has been deposited from the air is 16% and other states are 84%, I don't see how this strategy gets us down to the level that mercury stops being the problem for fish unless we have a partnership with other states that's effective.

Kathy Stecker: We've taken a first step by quantifying what's coming from within making sure we're accounting for what we're doing to reduce our portion of it. It's not just other states; it's the rest of the world. So it is a big problem to try to tackle but we've considered this the first step. That's why in the options for nonpoint source reductions includes that we'll get comments on them and maybe we will get some more ideas from that on how to get the rest of the reductions that we need.

Ms. Deerhake: It is a follow up. I was asking Kathy about this yesterday to make sure I understood that the message was clear in the report, although North Carolina will achieve what it is responsible for, the 67%. That will not achieve the reduction in largemouth bass fish tissue concentration below 0.3 nanograms per kilogram. So we will not achieve the fish tissue goal because we need other entities to do their part to help us achieve that goal. What I thought I heard you say at the end of your presentation was that because of this TMDL we'll be able to remove the fish consumption advisories or the designations. Did I misunderstand you?

Kathy Stecker: I believe I said a 67% reduction was needed from all sources including those outside the state in order to be able to do that.

Ms. Deerhake: I thought I heard you say that as a result of this TMDL that advisories would be removed.

Dr. Peterson: That's the listing 303d list.

Kathy Stecker: It will be removed from the 303d list.

Ms. Deerhake: Just because the TMDL is in place?

Kathy Stecker: Correct. I apologize for that confusion. I thought I was clarifying another question I had gotten about 303d listings. The 303d list is just a list of waters that require that don't meet standards and require a TMDL. So the only reason it would come off the list is because there would be an approved TMDL in place. Not because of the advisories would be lifted.

Ms. Deerhake: That's the issue with it; the TMDLs that we always are battling are making sure that they are fully implemented so that it truly is physically and chemically restored.

Mr. Morse: What would happen if this Commission did not approve the TMDL in July? What if we as a board Commission did not approve the TMDL for various reasons such as a flawed process to begin with, the burden it's placing on point source that only represents 2% of the problem. What if we make the decision not to approve it because of the unfairness and the wasted funds that are going to be spent when we are not going to be able to accomplish anything that we set out to accomplish? What would happen if we did not approve it?

Chuck Wakild: Let me give at least maybe a partial answer. These TMDLs are required under the federal Clean Water Act and we have an obligation to EPA to establish TMDLs for all of the waters in North Carolina and of that are designated as impaired, that essentially violates the water quality standards. There is, as you know a lot of waters on the list. One option would be to not send a TMDL to the EPA for approval. The problem with that is that they by the NPDES permitting rules, federal rules can require that without a TMDL that the effluent limits for people who have mercury in their effluent would be set at the water quality standard level of 12 nanograms per liter; which a lot of people couldn't meet. So a practical effect of approving a TMDL is to give us more flexibility for NPDES permit holders because we think that's a fairer way to do things and less costly. That's one of the effects and I would say is a primary driver for getting the TMDL on the street. Obviously this is not as you all have talked about going to result in the lifting of the consumption advisories that are out there, unless there's a change in the health department policies. You all have also talked about and we are going to proceed with evaluating our mercury 303d methodology for the next cycle as it relates to mercury. But of course that will take two years. So I don't know; that's kind of a rambling partial answer.

Chairman Smith: One other thing you might speak to is what other states' litigation experience have been, states that have not been as active in TMDLs as North Carolina has.

Kathy Stecker: It's not specific to mercury but there has been litigation against EPA actually in 39 states because the states were not developing; either not developing TMDLs or not developing them fast enough. EPA did not compel them to so that's what the losses were based on and we have so far avoided such a lawsuit here.

Mr. Morse: How have the other states in Region 4 dealing? Are they in the same boat we're in? My understanding and some information that I have received that we're the only state in Region 4 that are being asked to address a TMDL from mercury. Is that correct?

Kathy Stecker: No sir. Florida is close behind us. They'll have a TMDL statewide mercury TMDL by the end of the year. Also, Minnesota, New Jersey, New York all those northeastern states.

Mr. Morse: Rather than go through the TMDL process and burden point source to this extent when we are only 2% of the problem, what if we take action now to remove all of the water bodies in North Carolina off the 303d list because of the flawed process in which they were put on initially? Why don't we just move in that direction and not have to deal with a TMDL? Because my understanding is that in order to do a TMDL there's a certain process that must go on by EPA requirements that you have to do detailed analysis of all water bodies that are, in particular having those problems, where we're just blankly covering the entire state due to an advisory issue; and this advisory issue, even EPA doesn't recommend you do TMDLs based on fish advisories. So why don't we instead of going this process move to remove all these water bodies based on a fish advisory which was flawed to begin with, in my opinion?

Kathy Stecker: There were several comments in there. EPA did issue guidance for developing statewide and regional TMDLs which we did follow. So they acknowledged that is a way for states to address mercury. We have submitted the 303d list for 2012 and Chuck was mentioning that we could reevaluate the assessment methodology for 2014. That's the regulatory cycle for such for the 303d list.

Mr. Morse: So you're saying you can't do it in between. You've got to do every two years to remove a body off of the 303d list?

Kathy Stecker: That's the only time that EPA does their action of approving or disapproving.

Mr. Morse: If EPA knows that we're in the process of reevaluating the 303d list for mercury can they give us a 2 year where or hold off before we have to implement a TMDL? Can we ask EPA that consideration?

Kathy Stecker: Do you mean waiver from the TMDL?

Mr. Morse: Hold off. They've waited since....when was the first time we put all the river bodies on the mercury watch off this fish advisory? I understand that it's in 2006.

Kathy Stecker: In 2002 we started listing based on advisories.

Mr. Morse: So in 2002. What if we say, give us the 2014, give us 2 more years because we're in the process of evaluating whether we change our methodology? Would EPA consider that giving us 2 more years? They've waited since 2002. Can they wait until 2014 before we put all point sources to this exercise?

Chuck Wakild: It gets back to if we don't do this, whether they agree to let us wait 2 more years or not, it's really the NPDES permit rules that are kind of driving the requirement to address the issue in permits. They are saying and telling us (Jeff Poupart can speak to this more directly) and advising us that in order to get the renewal of permits for people who have mercury

in their effluent they're insisting on the 12 nanograms per liter to put in their permits. So if EPA were to say fine, wait 2 more years and evaluate and do all that, they're still going to insist in the interim you start addressing it in these permits.

Mr. Morse: Can't you use that same evaluation that you're calling for now in a general sense to those that are being addressed now?

Chuck Wakild: I don't believe so. We have talked a little about the methodology that got us to where we are now and as Kathy just said, it has been in effect and we've been doing it this way for ten years. I'm not sure kind of all of a sudden rushing without having a real thorough evaluation of that methodology and what alternatives are. Just taking a hard look at that we want to all of a sudden prejudge and now we've done it this way for ten years; now we're suddenly going to switch courses. I'm not advocating that. I'd rather do it in a more reason approach including public input.

Tom Cecich: I have a clarifying question. It sounds like we're dealing with the TMDL issue. It's a regulatory issue. Chuck described it almost as a permit shield for those already with NPDES, probably not the right terminology but that's what it evolves to. Much of the problem is not within our control because of the atmospheric deposition coming from other states and we discussed this at the Air Quality meeting yesterday. One component is the success of the Clean Smokestack Act which has had dramatic decreases in mercury emissions from electrical generating units in North Carolina. There's a success story and mercury emissions as well as other emissions have indeed been reduced. Then the problem becomes what about other states where there's transport and very likely where most depositions are occurring. I suppose the bad news is before they have refused to do and the good news is EPA has a rule that's in final draft called the mercury and air toxic rule that hopefully will be longer promulgated. Hopefully it will be a longer term solution that will actually get to the fish consumption issue. I thought I would at least mention that. I know nobody said that yet. I know we're trying to say, what's the best way to manage the problem given the regulations as they currently exist? Given that we can't do much about the bigger part of the problem, at least there's some good news on the horizon.

Mr. Tedder: I think when somebody mentioned something about 303d listing being removed for Hg if the TMDL goes forward. I think it goes from Category 5 or 4. Is that correct?

Kathy Stecker: That's correct.

Mr. Tedder: But it's still listed as impaired in Category 4?

Kathy Stecker: Yes.

Mr. Tedder: As far as the permitting aspect that Mr. Morse brought up and I think that what the staff has come up with and what they're looking at is a very reasonable way to back out of a mistake. That's my opinion on it. That's the way we've got it described in the 303d methodology. As long as it stays that way, as long as it's not site specific information required in the methodology, you're always have an advisory in the state, and the advisory is not site specific. We have very clear criterion from EPA as to how we should be going about developing

data to make site specific listings. If you've got site specific listings that way and if you clean up that stretch of river you can do the same type of analysis to 303d list. Right now the way it is in there because we've done it under advisory if you've got an area that you do the analysis the way EPA recommend, that you collect the fish; you do the analysis and run it, you can't be listed because it's still under advisory. That's a problem. Until we as a Commission step forward and do our job that the statutes allow and control the methodology, we do it and approve it this is going to continue to be a problem. As far as those one or two permits I feel for them. As far as the others, if I were them if the Commission was moving forward to look at the issue and look at the methodology I'd take the limit and turn around and ask for an SOC as soon as I violated it, and get a five year SOC to give the Commission time to do their job.

Dr. Peterson: In the context that I recall when we had waters east of I-95 as the areas that we de-listed and that was site specific. I recall before that we had Lake Waccamaw and Phelps Lake and a few other things that we focused on. It seems like we have the opportunity to deal where and where not the fish are at such a level of mercury that it endangers those who eat them. That's just to say that we've got work to do. We got to get back on square one to understand it. I wanted to say that although I made a rash comment about my concern about fairness relative to other states and perhaps countries as well. I wanted to say that I think we're exactly on the right course. It's just that I think we need to pursue that option that you listed of going to EPA and asking for a regional and the region might extend to California and Hawaii, not regional in the sense of the region before, but rather the air shed that we experienced to move EPA to take what has to be a national level solution to a national level problem. It sounds like from Tom's input and that was helpful. I knew that was going to be promulgated but I don't know the full extent of how that might achieve this. But it certainly couldn't hurt. If we advertise what we're doing and at the same time request that some sort of meeting go forward that engages the other states to try to solve this problem, so we're not out there alone. The other thing that is important is, of course and I'm sure it's computed in this or included in this computation through our Senate Bill 3 of some years ago to add to renewable, the requirement to add renewable at a certain level to our energy portfolio, our energy generation mix, we've made some progress in that regard that's going to continue in the years ahead. So I think North Carolina in some ways is ahead of the game in that aspect of things. To speak we've done a lot to remove coal as a fuel from some of our major generating stations and so is the neighboring state. I noted that the Tennessee Valley Authority has a number of stations that are coming where coal is not going to be used or entire power plants are going to come off line that are probably major contributors to this. I don't know where that comes into play but I thought that as we approach EPA we should harp upon the many things that we're doing, that portfolio diversity and the fact that we're moving towards it rapidly standard, it is important thing to note that we have adopted and it's something that is going to pay dividends here as well as in other contexts.

Ms. Deerhake: I have two different comments with one being technical and one is procedural. With regard to the technical one where we're talking about in state emitters, air emitters and out of state air emitters, perhaps the modeling addresses this. It explained clearly in the document that there're three different types of mercury floating through the air and some are more likely to deposit than the others. But also taking into considerations research such as that in Studentville it found that the role of nearby emitters can play a large part in concentrations and fish tissue similar study tracking down in the Everglades when they shut down. It was either solid or

medical waste incinerators and had a pretty fast rebound in fish tissue concentrations. I wanted to be certain that we know and can track that when the nearby emitters that is both instate, the TVA emitters which are being impacted by the recent settlement that was with North Carolina playing a large role that those nearby emitters are going to have perhaps more of an impact on fish tissue concentrations than global emitters. I don't know whether the modeling can account for source apportionment in that fashion or not.

Kathy Stecker: I'll say a little about it and then Laura if you want to add anything. We did include an analysis that the Division of Air Quality did on deposition prone mercury and we expect to see an even greater percent reduction in deposition prone mercury that originates in North Carolina.

Laura Boothe: The model that we're using is a version that EPA had for their mercury modeling. I'm not sure that particular version has the source apportionment in it. We would have to get a different version running on our computer system and make sure the files can translate to that model to do source apportionment for the deposition. But it's something that we do have the capabilities to do. We just have not done that modeling at this time.

Ms. Deerhake: My point is that we may find that the nearby sources have a greater impact than we're able to estimate at this time.

Laura Boothe: Right. It is possible.

Ms. Deerhake: My procedural question was that we have what appear to be two public meetings, not public hearings, and as a result there is not a hearing officer for the public meetings. Is that correct?

Kathy Stecker: That's correct.

Ms. Deerhake: The TMDL is going to come before the EMC for review and approval. It seems more appropriate to use a public hearing format rather public meeting formats so that we can have a formal hearing officer's report. Perhaps this is because we don't normally approve TMDLs but this is taking place this way. I don't know.

Chairman Smith: That's correct. I haven't been able to find any evidence or talk to anyone that can cite me to a TMDL that has previously come to the EMC for formal approval. We have dealt with various forms of implementation in various ways. For better or worse, right or wrong since this is not formal rulemaking, there's no requirement for a public hearing and hearing officer. So we set it up as public meetings. I would encourage all of the members, any of the members to attend one or both of the public meetings. I'll remind you that one of them is next Monday night, the 14th in Hickory if that's closer to you. The other one is Wednesday, the 23rd in New Bern. I wouldn't encourage you to speak. But it would be a good opportunity to listen.

Ms. Deerhake: Will the report back to the Commission be anything similar to one out of a hearing officer's report?

Chairman Smith: That's an excellent suggestion. I think we can make that happen, can't we Mr. Wakild and Ms. Holman?

Chuck Wakild: We can provide a written report of what the comments were and what our responses are.

Mr. Ellis: Kathy you mentioned that the implementation plan is not a part of this TMDL proposal. When does the implementation plan have to be prepared?

Kathy Stecker: There's no requirement for an implementation plan for a TMDL, but we thought it best in this situation to share how we intended to implement this particular TMDL. The difference is that we will not include the implementation plans in our submittal package to EPA. They don't get to approve or disapprove the implementation plans.

Kathy Stecker: No sir. The permitting strategy that's outlined in the document that's out for review is quite similar to our existing mercury permitting process, except for the 47 nanograms.

Mr. Morse: Could that 47 nanograms have an impact on point sources? Because I know some point sources have much larger maximum limits but by going to a standard of 47 what type of fiscal impact is that going to have on point sources that cannot meet that standard? Do we have any kind of thought or concern for that?

Jeff Poupart: As I mentioned earlier there has only been a. So it is not anticipated that any technology will have to be installed except to possibly one or two facilities. No fiscal note is done.

Mr. Morse: Thank you.

Chuck Wakild: Just to add on to that we'll be talking with organizations of point source dischargers as early as this afternoon and making sure they're going to have questions about the implementation thing, a lot of the things that you all have talked about. We will begin to focus in on, no doubt those facilities that may have to do more work. Now that may go beyond more source minimization kinds of things within their facilities and ultimately will likely get some notion. Whatever that is we'll bring back in this report in July.

Mr. Tedder: On Tom's comment that you have a TMDL document you have an implementation. Fairly honestly EPA is more interested in the TMDL. I'm sorry but it is a widget. You can check it off, the implementation. I'm not aware that EPA has seen this implementation and I hope we don't go through all of this if it were to make it that far, and haven't adopted implementation plan. Permits go to EPA and they still stay the course which they could because they don't approve the implementation plan. You just have to cross the figures and hope they're agreeing with you. That's my understanding.

Chairman Smith: Other comments or questions? Hearing none, thank you very much

12-10 Preview of Nutrient Forum

Alan Clark: Thank you Chairman Smith. Like Kathy I've changed my address to Good Morning as opposed to Good Afternoon. We've got the North Carolina Forum on Nutrient Over-Enrichment coming up at the end of the month. I understand that the majority of you are planning to attend, which is great. We thought this would be a good time to remind you what led to the scheduling of the event as well as providing an overview of the Forum itself. It adds up to some ongoing nutrient related issues that you could be facing later this year in the areas of water quality standards, water quality protection and nutrient management strategy development.

As background EPA has been pushing states to develop numeric in-stream nitrogen and phosphorus standards for a number of years. Nitrogen and phosphorus are considered causal standards because they contribute to nutrient related problems such as algae blooms. Those states do not have in-stream nitrogen and phosphorus standards including North Carolina with the exception of our nitrate health standard for water supply watersheds. So North Carolina, rather than numeric nitrogen and phosphorus standards, we've been relying for many years on our numeric chlorophyll-a standard along with dissolved oxygen and pH to address nutrient problems. These are considered response standards as opposed to causal standards because they reflect a response of the environment above the nutrients as long as other key factors including sunlight, water clarity and retention time. All these factors are typically involved in creating nuisance algae conditions, not just the nutrients.

These standards are the basis for a cleanup of the Chowan River many years ago in establishing nutrient management strategies, various river basins and lakes across the state including the Neuse and Tar-Pamlico River Basins, and Falls and Jordan reservoirs. We've also used these standards to place nutrients and/or monitoring conditions on a number of NPDES permits, both to restore nutrient impaired waters and to prevent other waters from becoming impaired.

The reliance on response standards alone has been criticized by EPA because these standards are not perceived by EPA as being protective. EPA contends that they're only useful after water bodies impaired. North Carolina disagrees with EPA's position contending that response standards such as chlorophyll-a can be used for protective purposes. But in response to EPA's concerns and to be more proactive in preventing further nutrient related water impairments, staff proposed chlorophyll-a thresholds back in 2010. These rules were intended to trigger nutrient reduction permitting requirements of chlorophyll-a levels which were determined to be posing a threat to water quality standards. The proposed chlorophyll-a thresholds for various waters in the state were set at 60% of the chlorophyll-a standard and exceedances of the threshold would trigger regulatory actions to begin controlling of nutrients from permitted activities such as wastewater treatment plants and NPDES stormwater systems.

Draft rules were prepared back at that time by staff with input from two facilitated stakeholder meetings. However, while many stakeholders supported the threshold concept, there continued to be concerns about how the rules would be implemented. These concerns led to the Commission putting a hold on further processing of the threshold rules in November of 2010. Chairman Smith proposed the following five directives to staff: 1) was to review alternatives for the threshold rule approach; 2) to develop a clearer statement of the underlying science in the form a white paper or other form; 3) was to provide a more detailed review of cost and cost savings; 4) was to consider basing the threshold on something other than chlorophyll-a; and 5) was to consider other indicators of trending or change toward nutrient related water quality

impairment. In addition, he has emphasized the need for increased public understanding of nutrient over-enrichment and management.

So in response to the chairman's directives, staff proposed in January 2011 to hold a scientific nutrient forum that would gather experts in the field of nutrients and nutrient management emphasizing the following areas of science, of federal perspective, state perspective of North Carolina and other states, economics and public policy. That leads us to the upcoming May 29th forum. The nutrient forum has evolved into a two-day event with seven sessions and twenty presenters. Each session typically includes three presentations followed by a question and answer period. All questions will be asked by a four member panel which includes Chairman Smith, Mayor Moss, Jackie Gerald who's an engineering manager with Charlotte Mecklenburg Utilities Department and Grady McCauley, policy director with the Conservation Network. The conference website now has a link where conference attendees can submit questions that they would like the panelists to ask. Questions will be forwarded to the panel members until May 24th. It should be noted that presentation abstracts have been posted to the conference website. So this is added information that should prove useful to those participants that would like to pose questions and have them forwarded to the panelists.

Also, keep in mind a detailed proceedings will be available later this year and it will be capturing the presented information, the questions and answers from each session as well as each question posted to the website.

Subsequent to the forum there're several nutrient related issues that will likely come before you before the end of the year. One is the matters of establishing a plan for development of instream nitrogen and phosphorus standards. This is a condition of one of our federal grants with EPA. EPA is expecting a product by the end of the year. We have advised EPA that development of such a plan will rely on input from the Environmental Management Commission, and that the forum, we believe, will provide Commission members with information that will be important to the deliberations.

The second, a related issue pertains to developing more proactive measures for preventing additional nutrient impairments in North Carolina. This is essentially a follow up to the threshold discussion that we had earlier, although I don't envision at this point, we're necessarily presenting threshold rules again, but looking at other approaches.

A third issue pertains to High Rock Lake. We anticipate completion of the watershed and lake models by this Fall, and if so we may have nutrient reduction targets based on the modeling, which the staff could be bringing to you for further consideration.

Before I close I want to give credit to Dianne Reid and Jay Sauber for being the real driving forces behind putting this forum together. They've done a great job. Also wanted to mention to those that may be listening in to the broadcast that haven't registered yet, there is still time until May 22^{nd} or until we've reached capacity. If there's time today we would be glad to answer any questions about the forum. Thanks.

Mr. Morse: If we are at the forum and we hear a discussion, and it raises a question during the presentations, are we going to be allowed to ask questions from the floor?

Discussion by Commission members and DWQ staff with the resolution that

the forum attendees will have the opportunity to pass up questions with the four panel members balancing which questions they're going to have time to ask.

Ms. Deerhake: I'll just say that the decisions that will come out of this will probably receive national attention too, because this is a very high profile subject. I think we're very fortunate to have people from both Florida and the Chesapeake Bay watershed participating. We can learn so much from them from what has worked and what has not worked. Hopefully it will be the state's process a lot more efficient.

Amy Pickle: Is there any reason that the packet of information that has been provided to the panelists isn't available for all the Commissioners to get that background? I think for those of us who need a little nighttime reading to be able to get a little bit more up to speed to be able to facilitate our ability to pass up helpful questions.

Chairman Smith: Mr. Clark you ought to be able to accommodate that.

One other comment for those of you that are licensed lawyers in North Carolina whether you're on the Commission or intending to attend this forum, I've applied to the North Carolina State Bar for continuing legal education credit for these two days. I don't have approval yet but I'm optimistic about it. Then if we get approval then it will be up to 12-1/2 CLE hours which is something I need. Any other comments? Thank you Mr. Clark.

We'll move into committee reports.

III. Status Reports

A. Water Allocation Committee Mayor Darryl Moss, Chairman

The Water Allocation Committee only had one information item. We received more detailed information on water supply as it relates to areas in our state that might be more potentially impacted by hydraulic fracturing. The Water Allocation Committee will continue doing this as kind of a deeper dive as this issue continues to percolate with our colleagues down the mall. Thank you sir.

B. Water Quality Committee Dr. Charles H. Peterson, Chairman

The Water Quality Committee met and approved a major variance from the Neuse River riparian area protection rules for a condominium development in New Bern. We also moved forward with a long standing assessment that we've been making to deal with alternative ways to provide buffer mitigation, a flexible process that includes new mechanisms of doing the same thing that aren't incorporated in our current rules. That particular item will come to the Commission in due time. We looked at three more river basins, if you can call them river basins. We had such a small fraction of the whole basin. These were ones where we deserve to have our committee meetings some day, the Savannah, Hiwassee and Little Tennessee basins. I'm looking forward to my visit to Transylvania, Clay counties and others someday to actually see what we get to talk about, some of our actual jewels in the state. Then we had the Jordan Lake issues and the approval of the local programs that came before us today. You've seen that in detail. We got to look at a program that Jay Sauber and others have put together that is a random selection process of our monitoring data to give us a better idea, perhaps it is more statistically sound of the fraction of our waters that meets and does not meet water quality standards. We spend so much time with the violations, and where the problems are, that we tend to get a false impression of how much tremendous water quality we have in parts of the state. That's, in fact, what this

information item showed that the percentage of waters chosen at random to be assessed shows a pretty good history of what we've got and a pretty good pattern of our water quality. That was the extent of our meeting.

C. Air Quality Committee Marion Deerhake, Chairman

The Air Quality Committee met. We had one concept which was a preview to some decisionmaking that EPA is in the process of making about basically the definition of solid waste as it applies to fuels that are put into boilers vs. commercial and industrial solid waste incinerators. The outcome of that is expected this Spring but we went ahead and heard the concepts so that the staff can be poised to move forward with drafting the rule when the time comes. We had no action items in terms of draft rules. You heard two agenda items today dealing with air quality on permitting exemption and the carbon dioxide deferral. We had three information items. One was an overview of the utility, mercury and air toxic standards that is also known as the electric generating utility, electric generating unit maximum achievable control technology standards, and that was a good overview of what those standards are expected to achieve and how they interact or in some cases may be outshined by the Clean Smokestack Act. We also heard a presentation on inspection and maintenance study report that was called by the Legislature. The staff was charged with looking at coming up one of two decisions, either removing the entire inspection and maintenance program for automobiles for emissions monitoring and verification or removing the most recent three model years exempting them from the program. As a result the recommendation was to exempt the three most recent model years from the program finding that in the grand of scheme of things it was a relatively low impact to air quality in terms of the emissions. There was considerable discussion about that. I would suggest if you want to hear the details about the charge that the staff received there is an extensive slide presentation on the Air Quality Committee portion of our agenda today. We also had an overview of the transportation confirmative planning. That is taking place typically at the municipal level at the metropolitan level to assure that transportation planning addresses air quality which in term leads to assurance of federal funds for road construction.

D. Renewable Energy Committee Dickson Phillips, Chairman

The Renewable Energy Committee did meet. I've already alluded to one of our presentations which concern the carbon contribution from burning woody biomass primarily. The first presentation was from Dr. Dennis Hazel from North Carolina State University who gave us an update on what's happening in North Carolina with, primarily again woody biomass for power generation. He also alluded to some biofuel production as well. This is a topic that we dealt in great depth a year or two ago and we're dipping back into this just reminded what a complex subject it is. I guess a takeaway for the full Commission is that not a whole lot is yet happening in the use of woody biomass and biomass in general for power generation. There are three power generating facilities in the state that are either using exclusively or substantially woody biomass. There are a somewhat larger number of facilities that are co-generating that is generating power and also generating heat, thermal energy. Another imponderable is that there is now a great deal of pressure coming from Europe to provide for the pellet use of pelletized biomass for their power production. Dr. Hazel thinks that's coming quick and fast in North Carolina. But again there are many uncertainties about that in what those impacts are going to be, concerns on impacts in addition to carbon or wildlife and soils and in addition to the general

forest level landscape type impacts. So we talked so much about before. I think this is an issue to where I need to get back into and monitor and think about whether our charge is going to be to adopt a regulatory scheme as we move forward.

E. NPDES Committee Dr. Ernest Larkin, Chairman

The NPDES Committee met by phone on April 13th. We were requested to agree to a stay of contested case hearing pending results of a study to relate North Carolina's narrative water quality standard for color to a numeric standard. At issue in the case is a discharge from the Blue Ridge Papermill in Canton and Haywood Counties into the Pigeon River about 39 miles upstream from Tennessee, and specifically whether a variance is needed from a water quality standard for color in that discharge. Our standard says that color is allowed only to the extent that it's not injurious to public health, secondary recreation and/or aquatic life, or so long as it does not adversely affect the palatability of fish, the aesthetic quality of fish or impair the waters for any designated uses. The aesthetic quality is the only one that's at issue in this particular case. There has been a long history controversy over this deal and its permits. There have been variances and contested cases before. Scientific study groups, work groups, the EPA and Tennessee and North Carolina are arguing with each other. The company, however, has worked very hard and very successfully to decrease significantly the amount of color that it produces. The question is whether it's enough of a decrease so that we don't need a variance any more. With our standard being aesthetic quality it's a little bit difficult to say or answer that. The committee said, "Yes we do need a variance" in July of 2010 and issued one. Two months later Cocke County, Tennessee and five environmental groups said, "No we don't think you do" and brought a contested case hearing. So what we've been asked to do in April we were asked to agree to a stay of that and a partial settlement in order to go ahead and do that study. That is underway and we will hear more about it in the future sometimes.

The Groundwater Committee did not meet nor did the Steering Committee. We move to concluding remarks by Commission members.

IV. Concluding Remarks

Amy Pickle: I was distracted while you were very kindly and warmly welcoming me to the Commission. I would be remised if I did not take a chance to say to everyone how delighted and honored I am to be up here with all of you. I look forward to working with you all over the coming years.

Ms. Deerhake: I certainly welcome Ms. Pickle. It's nice to have another woman back on the Commission. I wanted to ask about the hydraulic fracturing report that came out. I believe since we last met and is there any indication as to how the regulations which the department recommends or thinks it's necessary how those might interact with the Commission? I understand that at least we are hearing about it now in Water Allocation, but there's various other media that could potentially be impacted. Are you getting any information about that?

Chairman Smith: No. But I think that's an excellent suggestion that we take a look at.

Sheila Holman: I wanted to mention that the division is working with the Public Utilities Commission staff on the 2011 Clean Smokestack Act report that's looking at all aspects of the legislation including whether the two utilities have met their NOX and SO₂ emission caps that are provided in the legislation. It's a very good story to tell. They have met the NOx limits. Those were established in 2007 and 2009 limits. One company has also already met its' SO₂ limits for 2013. So we're seeing tremendous SO₂ and NOX reductions, and of course the attendant mercury reductions that have been alluded to earlier today. That report is due to the General Assembly on June 1st. I believe this may have come up yesterday in the Air Quality Committee. I was not able to attend because I was out on travel. But EPA did finalize the ozone boundary nonattainment boundaries for the 2008 ozone standard that occurred last week. EPA did agree with the state's recommendation for the Charlotte area. That includes all of Mecklenburg County and parts of Gaston, Lincoln, Airedale, Cabarrus, Rowan and Union counties. You all may recall that we have currently four monitors in the region that are violating the standard at 75 ppb. The values we are seeing at those four monitors range from 76-79 ppb. We also have two monitors in North Carolina in that area that are attaining, one in Lincoln and one in Union County. I also wanted to give you a heads up on possible legislation coming during the short session. You all may recall that the leadership of the Environmental Review Commission directed DENR to work as part of this small working group on air toxics legislation looking at what potential changes should be made to our air toxics rules. At the April 26th ERC meeting a final draft of the legislative proposal was passed for consideration during the upcoming legislative short session, and that draft bill is posted on the ERC's website. The draft legislation would basically exempt those emission sources that are covered by federal air toxics regulations such as max standards or Gantt standards. It requires the division to review each permit application to determine if the toxic air emissions would pose an unacceptable risk and if one does exist the department would make a finding that an unacceptable health risk exists. It's basically putting into statute the directors call part of the existing air toxics rules. Finally it would require the division to review the air toxics to determine if changes could be made to the rules or the implementation to reduce unnecessary regulatory burden and increase efficient use of the division's resources while protecting the public's health. We are required to follow up with a December 1, 2012 report, again assuming passage of the draft bill. But I wanted to give you all a summary of that and that's all I have for today.

Chuck Wakild: Two things briefly. You might recall that in the last session of the General Assembly they directed their Fiscal Research Division (that's the General Assembly's budget people) to study DENR regional offices and essentially justify whether they should continue. The good news is the Fiscal Research Division has completed the study and has recommended the regional offices be fully funded. But we are holding our breath until the General Assembly passes the budget in this session. The other thing is that I will mention I think everybody knows. But in case not, Ted Bush has been promoted into the Deputy Director's job. I'm very happy about that and Ted will do a great job. Many of you have worked with him pretty closely over time and it should be a pretty seamless kind of transition there. We will be working to backfill the Section Chief Job for Aquifer Protection.

Chairman Smith: That's my mistake Mr. Bush. I apologize. I was thinking that we had made that announcement at the March EMC meeting. So welcome and congratulations on being the Assistant Division Director.

	The	meeting	ad	ourned	at	2:00	p.m.
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NOTE: Attachments are on file in the Division of Water Quality with the Official Minutes.

Lois C. Thomas, Recording Clerk

By Commission Members

By Directors By Counsel

By Chairman

Adjournment AG05-10-12